IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL WRIT PETITION NO.677 OF 1998

Shri K.R.Surendran : Petitioner

versus

P.V.Subramaniam & Anr. : Respondents.

Mr.Prabhakar R. Naidu for the petitioner.

Mr.Sameer Tambe h/f Mr.Sandesh D. Patil for Respondent No.1.

Ms.Rajeshree Gadhavi, APP, for State.

WITH

CRIMINAL APPLICATION NO.2913 OF 2000

P.V.Subramaniam : Applicant.

versus

K.R.Surendran & Anr. : Respondents.

Mr.Sameer Tambe h/f Mr.Sandesh D. Patil for the applicant.

Mr.Prabhakar R. Naidu for Respondent No.1.

Ms.Rajeshree Gadhavi, APP, for State.

CORAM : V.M.KANADE, J.

DATED : 30th January 2006.

ORAL ORDER

1. Heard learned counsel appearing on behalf of the petitioner and learned counsel appearing on behalf of Respondent No.1. By this petition, the petitioner is challenging an order of issuance of process passed by IV J.M.F.C. Thane on a complaint filed by Respondent No.1 under Section 138 of the Negotiable Instruments Act.

2. The petitioner is also challenging the order passed by the said Magistrate rejecting the application filed by the petitioner for recalling the process which was issued by him.

3. The brief facts, which are relevant for the purpose of this petition, are as under :-

. A complaint was filed by Respondent No.1 under Section 138 of the Negotiable Instruments Act. It is alleged that certain amounts were given by the complainant to the accused towards

financial assistance and also for the purpose of purchasing a gala in the industrial estate. It is also alleged in the complaint that the accused was employed in a private company. However, he was in need of financial help in the year 1989. Therefore, the complainant and one of his friends decided to help the accused financially and gave financial help to the tune of Rs.Seven lakhs as the accused was to purchase a gala in the industrial estate. It is alleged in the complaint that there was a condition imposed by the complainant that the gala was to be purchased in the joint name of the complainant and accused. It is further alleged that the accused, however, entered into an agreement of sale in his own name for purchasing the said gala. When this fact was brought to the notice of accused, he agreed to repay the amount by issuing six post dated cheques dated 6-2-1995 which were drawn on The Thane Janata Sahakari Bank Ltd. Thane for total amount of Rs.Seven lakhs. However, after the said six cheques were deposited, on instructions from the accused, for encashment, all the cheques were returned dishonoured as there was no sufficient balance in the account of the accused. Accordingly a legal notice was issued by the

complainant asking the accused to pay the amount of dishonoured cheques within 15 days. A reply was given by the accused in which various defences were raised. Hence a complaint was filed by the complainant and the Magistrate was pleased to issue the process on the said complaint. Thereafter an application was preferred by the accused for dismissing the complaint. But the said application was also dismissed.

4. It is submitted by the learned counsel appearing on behalf of the petitioner/accused that the story put up by the complainant in his complaint is fictitious inasmuch as the agreement, which was executed by the accused for the purpose of gala, was executed in the year 1991 and, therefore, when the alleged amount of Rs.Seven lakhs was given by the complainant to the accused, at that time he had already purchased the gala. He, therefore, submitted that this clearly indicates that the averments made in the complaint are false and fabricated which was evident from the agreement for sale which was executed on 31.01.1991 by the accused with the owner of the said gala. He further

submitted that the cheques, which were issued, were blanks cheques and, as such the complainant did not establish that the said cheques were issued towards the payment of debt or enforceable liability. He invited my attention to the cheque record slip wherein details of transaction in respect of the petitioner's cheque book maintained by him in order to establish that the said cheques, which were issued, were blanks cheques on the basis of documents annexed to the petition. It was also submitted that the said cheques were not issued for the purpose of payment of debt or legally enforceable liability. The learned counsel for the petitioner/accused then submitted that the Supreme Court had held that if the accused, in an application which is filed under Section 482 of the Cr.P.C. and Section 227 of the Constitution of India, produces evidence, which would indicate that there was no legally enforceable liability, then the High Court while exercising its jurisdiction under Sections 482 of the Cr.P.C. and 227 of the Constitution of India was competent to come to the conclusion that the presumption, which is raised under Section 139 of the Negotiable Instruments Act, is rebutted by the accused and,

on that ground the complaint was liable to be quashed. The learned counsel for the petitioner/accused, however, after carefully going through a small bunch of judgments, could not produce the judgment of the Supreme Court. In my view this submission of the learned counsel for the petitioner cannot be accepted. He further submitted that the suit, which was filed by the complainant for dishonoured cheques, has been decreed recently and, that in the said case he had given evidence to the effect that he did not have any evidence besides the dishonoured cheques to show that the cheques were issued towards legally enforceable debt or liability.

5. It is not possible to accept the submissions made or canvassed by the learned counsel appearing for the petitioner/accused. The provisions of Section 139 of the Negotiable Instruments Act raise a presumption that the cheques which were issued and drawn in favour of the complainant are towards legally enforceable debt or liability and such a presumption has to be rebutted during trial. The High Court while exercising its jurisdiction under Section 482 of the Cr.P.C. is not empowered to arrived at the

finding of fact stating that the said burden is discharged or not on the basis of documents which are filed in the High Court. The question, whether the cheques, which were issued, were blanks or not, is the question of fact which can be determined only by the trial Court after the evidence is adduced by both the parties. In the result, the submissions which are canvassed by the learned counsel on behalf of the petitioner/accused will have to be decided by the trial court and cannot be gone into by the High Court while exercising its jurisdiction under Section 482 of the Cr.P.C.

6. After the order was dictated and before it could be transcribed and signed, the learned counsel appearing on behalf of the petitioner tendered two judgment on which reliance was placed by him, because the copies could not be tendered by him during the course of argument as the same were not available. Since the petitioner is relying on these judgments, I would like to refer to the said judgments. So far as 1st judgment is concerned, it is the judgment of Supreme Court in the case of **Monaben Ketanbhai Shah and anr. v/s. State of Gujarat & ors.**

reported in **(2004) 7 SCC 15.** In my view the ratio of the said judgment will not be applicable to the facts of the present case. In the said case, the Issue before the Supreme Court was, whether a complaint which did not contain any averment in respect of sleeping partner or non-working partner could be continued against such a sleeping partner and, the Supreme Court in the said case held that there are no averments in the complaint in respect of either non-working partner or Director of the Company and it is not alleged that they are in-charge of day-to-day management of the company and the process issued by the Magistrate against such category of partners was liable to be quashed.

. In my view, the ratio of the said judgment will not be applicable to the facts of the present case. In the present case it is submitted by the learned counsel appearing on behalf of the petitioner that the cheques which were issued were not towards any legally enforceable debt or liability and no averment to that effect has been made in the complaint and, therefore, the process was liable to be quashed. The facts of this case are entirely different

and, the ratio of the judgment in Monaben's case, therefore, is not applicable to the facts of the present case.

7. The learned counsel appearing on behalf of the petitioner has also relied upon the judgment given by the Single Judge of Gujarat High Court in the case of **Bharatbhat K. Patel v. C.L.Verms (Since deceased) Thro' POA-Surjit Singh Macker and anr.** reported in **2002 Cri.L.J.3469** in which it has been held that prima facie if it is shown to the High Court, in an application which is filed for quashing a complaint under Section 482 of the Cr.P.C., that the cheques which were issued are not towards any legally enforceable debt or liability, then in that case the High Court can quash the process which is issued while exercising its jurisdiction under Section 482 of the Cr.P.C.

. In my humble view, it is not possible to accept the view taken by the Single Judge of Gujarat High Court. View expressed by the Gujarat High Court is not binding on me and at best it has a persuasive value. Secondly I am unable to accept the said view because Section

139 of the Negotiable Instruments Act raises a presumption that the cheque which is drawn in favour of payee is for the satisfaction of a legally enforceable debt or liability and this presumption has to be rebutted by the accused before the court of trial either on the basis of admission which are given by the complainant in his Examination-in-Chief or in the Cross-examination and, thereafter the Court has to appreciate the evidence and record a finding. This course of action cannot be undertaken by High Court while exercising its jurisdiction under Section 482 of the Cr.P.C. The question of discharge of burden of proof will have to be determined by the fact finding authority which is trial Court. The ratio of the aforesaid judgment, in my humble view, will not be of any assistance to the petitioner in the present case.

8. Thus, no case is made out for interfering with the order of issuance of process by the trial Court or with the order of rejecting the application for recalling the process which is passed by the Magistrate. There is no substance in the grounds raised in this petition. In the result, the writ petition is accordingly

dismissed. Rule is discharged. Interim order passed by this Court is vacated. The trial Court is directed to decide the complaint as expeditiously as possible and in any case within a period of six months. Office to inform the trial Court forthwith that the interim order passed by this Court is vacated. The petitioner/accused and respondent/complainant to appear before the Magistrate on 20th February 2006. The learned counsel appearing on behalf of the petitioner/accused submits that in spite of best efforts taken by him, he has not been in a position to contact his client. If the petitioner/accused does not remain present on 20th February 2006 in the trial Court, the trial Court to issue non-bailable warrant against the petitioner/accused which should be made returnable within two weeks. If in spite of issuance of non-bailable warrant, the petitioner is not traced, further orders may be obtained by the complainant for issuance of proclamation or attachment of property of the petitioner/accused. With these directions, the petition is disposed of. In view of dismissal of the Writ Petition, the Criminal Application No.2913 of 2000 for vacating the interim order passed by this Court

does not survive and hence it is disposed of accordingly.

[V.M.KANADE,J]